1 In Court of Claims of the United States

No. F–205

THE CREEK NATION
vs.
THE UNITED STATES

I. *History of proceedings*

On July 3, 1926, the plaintiff filed its original petition.

On July 23, 1926, by leave of court, the plaintiff filed its amended petition.

On June 24, 1927, by leave of court, the plaintiff filed its second amended petition, which is as follows:

II. *Second amended petition. Filed June 24, 1927*

To the honorable the Court of Claims:

The petitioner, the Creek Nation, respectfully represents—

I

That by a certain act of Congress, approved May 24th, 1924 (United States Statutes at Large, vol. 43, part I, page 139), petitioner was authorized and empowered to bring this action. That said act was later modified by a joint resolution (44 Stat. 568) permitting plaintiff to bring separate suits on one or more causes of action.

2 II

That by a treaty duly entered into by the United States and petitioner on the 14th day of February 1833, the United States granted, in fee simple to petitioner, the following described lands to wit:

"Beginning at the mouth of the north fork of the Canadian River, and running northerly four miles; thence running a straight line so as to meet a line drawn from the south bank of the Arkansas River opposite to the east or lower bank of Grand River, at its junction with the Arkansas, and which runs a course, south 44 degrees west, one mile, to a post placed in the ground; thence along said line to the Arkansas, and up the same and the Verdigris River to where the old territorial line crosses it; thence along said line north to a point twenty-five miles from the Arkansas River, where the old territorial line crosses the same; thence running a line at right angles with the territorial line aforesaid or west to the Mexico line; thence along the said line southerly to the Canadian River or to the boundary of the Choctaw country; thence down said river to the place of beginning."

III

That by article 3 of the treaty of 1866 (14 Stat. 785), the Creek Nation ceded to the United States "the west half of their entire domain, to be divided by a line running north and south." That article 8 of said treaty is as follows:

3 "It is agreed that the Secretary of the Interior forthwith cause the line dividing the Creek country, as provided for by the terms of the sale of Creek lands to the United States in article third of this treaty, to be accurately surveyed under the direction of the Commissioner of Indian Affairs, the expenses of which survey shall be paid by the United States."

IV

That on August 22nd and 24th, 1871, Frederick W. Bardwell, under the direction of the Commissioner of Indian Affairs, surveyed and established the boundary line between said Creek Nation and the land ceded by it to the United States. That said Creek national domain had, at said time, never been accurately surveyed and that said Bardwell divided said national domain without any data by which to make an accurate division. That said Creek Nation, at said time, complained that more than one half of their national domain had been taken by the running of said line; but that said complaints were disregarded and that on the 5th day of February 1872 the Secretary of the Interior approved said Bardwell line, and that said Bardwell line thereby became established as the west boundary of the Creek Nation.

V

4 That in 1872 one E. N. Darling, having been directed to divide said ceded land into sections, closed the corners of his eastern line of sections east of said Bardwell line, thus overlapping said Bardwell line and making a new north and south line east of said Bardwell line and within the lands retained by the Creek Nation.

VI

That from various surveys that had been made, the Creeks learned, in 1881, that said Bardwell line had actually taken over 200,000 acres of their land which they had not ceded, and for which they had received no compensation. The Creek Nation continuing to press its claim to this land, Congress, by act approved March 3rd, 1885 (23 Stat. 367), provided, that unless said Creek Nation should, within twelve months, by an act of its national council, accept and ratify said Bardwell line, no payments would be made of any money due them by the United States under their various treaty provisions.

That in compliance with said act of Congress, said Creek National Council passed said required resolution, accepting and ratifying said Bardwell line, a copy of which resolution is hereto attached as exhibit A. That said Bardwell line thereby became by an act of Congress, ratified by the Creek Nation, the western boundary of said Creek Nation.

VII

That notwithstanding the fact that the west boundary of plaintiffs' land had been thus defined and established, certain maps in the General Land Office made from the erroneous Darling survey, showed a strip of land, east of the Bardwell line, containing 5,575.57 acres, extending along said entire boundary, to be the property of the United States.

VIII

That when said lands of the United States, west of said Bardwell line, were, on September 21, 1891, opened for settlement, the General Land Office did, on account of said erroneous map, through error and inadvertence, permit said strip of land, east of said Bardwell line, to be opened to settlement, later through error and inadvertence, did issue patents therefor.

IX

That said situation having been called to its attention, Congress did, on June 21st, 1906 (34 Stat. 325), pass an act redeclaring said Bardwell line to be the west boundary of said Creek Nation. But that although Congress had thus declared said strip of land to be still the property of the Creek Nation, the defendant, whose duty it was to take action on behalf of petitioner, failed to have said patents canceled, and remove said trespassers from the land of petitioner.

X

That the defendant has always at all times mentioned herein, had entire control of the affairs of petitioner, and has administered them as its own, and that, therefore, plaintiff has not had, nor has it now, any redress or means to recover said land, except through the action of the defendant.

XI

That although said situation was well known to defendant, and although it was often requested to put plaintiff in possession of said land, defendant has refused and omitted so to do. Plaintiff has been, during all said time, and now is, excluded from the use and occupancy of said land.

Wherefore, plaintiff asks for judgment against defendant for the full value of said land with interest at six percent per annum from such date as the proof shows it is entitled.

THE CREEK NATION,
By E. J. VAN COURT,
Its Attorney of Record.

Counsel:
CHESTER I. LONG,
GEO. E. CHAMBERLAIN,
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W. E. STANLEY,
SAMUEL W. MCINTOSH,
ELTON W. STANLEY.

7 [*Duly sworn to by E. J. Van Court, jurat omitted in printing.*]

Exhibit A to second amended petition

Whereas, by act of Congress approved March 3d, 1885, entitled:

"An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes "An appropriation for interest money was made for the benefit of the Muskogee Nation, providing that no part of the same shall
8 be paid unless the Creek Nation shall, within twelve months, and in pursuance of a resolution of its national council first had and obtained, make, and file in the office of the Secretary of State, an acceptance and ratification of the survey made and approved by the Department, under the treaty of June 14th, 1866. Therefore,

"*Be it enacted by the national council of the Muskogee Nation:* That the survey of the line intended to define and designate the west half of the entire domain of the Creek Nation, ceded to the United States by the third article of the treaty, proclaimed the eleventh day of August, eighteen hundred and sixty-six, for the purpose of settling Indians and freedmen thereon, and which survey was approved by the Secretary of the Interior on the fifth day of February, eighteen hundred and seventy-two, be and the same is hereby accepted and ratified; and the principal chief is hereby instructed to file in the office of Secretary of State of the United States, a duly authenticated copy of this act at as early a day as practicable."

Approved November 4th, 1885.

9 III. *General traverse. Filed July 28, 1927*

And now comes the Attorney General, on behalf of the United States, and answering the second amended petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the second amended petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

IV. *Argument and submission of case*

On May 11, 1931, this case was argued and submitted on merits by Mr. E. J. Van Court, for plaintiff, and by Mr. Charles H. Small, for defendant.

10 V. *Special findings of fact, conclusion of law, and opinion of the court by Williams, J.*

Filed March 13, 1933

Mr. E. J. Van Court for plaintiff. Messrs. Paul M. Niebell, Chester I. Long, Geo. E. Chamberlain, Peter Q. Nyce, J. D. Houston, Austin M. Cowan, Claude I. Depew, James G. Norton, W. E. Stanley, Samuel W. McIntosh, and Elton W. Stanley, were on the brief.

Mr. Charles H. Small, with whom was Mr. Assistant Attorney General Charles B. Rugg, for the defendant. Mr. George T. Stormont was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special findings of fact

I

By an act of Congress approved May 24, 1924 (43 Stat. 139), it was provided:

"That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States: *Provided, however*, That the provisions of this act shall not be construed to confer jurisdiction upon the court to hear, examine, consider, and adjudicate any balance claimed to be due on the so-called Loyal

Creek claim, or any amount claimed to be due to equalize allotments among members of the Creek Tribe.

"SEC. 2. Any and all claims against the United States within the purview of this act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within 5 years from the date of approval of this act, and such suit shall make the Creek Nation party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Creeks approved by the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indian nation to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of said Indian nation.

"SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

"SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

"SEC. 5. That upon the final determination of any suit instituted under this act, the Court of Claims shall decree such amount or amounts as it may find reasonable to be paid the attorney or attorneys so employed by said Indian nation for the services and expenses of said attorneys rendered or incurred prior or subsequent to the date of approval of this act: *Provided*, That in no case shall the aggregate amounts decreed by said Court of Claims for fees be in excess of the amount or amounts stipulated in the contract of employment, or in excess of a sum equal to 10 per centum of the amount of recovery against the United States.

"SEC. 6. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy.

"SEC. 7. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in such case."

Under the provisions of this act, the plaintiff filed an original petition, an amended petition, and a second amended petition, on July 3, 1926, July 23, 1926, and June 24, 1927, respectively; in answer to each of which the United States duly filed a general traverse.

II

By articles II and III of the treaty of February 14, 1833, between the United States and the Creek Nation (7 Stat. 417, 418), the United States agreed to grant to the Creek Nation certain land in what is now Oklahoma.

Article II contains a general description of the grant.

Article III is as follows:

12 "The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

III

By the treaty of June 14, 1866, between the United States and the Creek Nation (14 Stat. 785, 786, 788), the Creek Nation ceded and conveyed to the United States, for purposes indicated therein, the west half of their entire domain, article III of the treaty reading in part as follows:

"In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands, being retained by them shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; * * *"

Article VIII of the treaty of June 14, 1866, provided as follows:

"It is agreed that the Secretary of the Interior forthwith cause the line dividing the Creek country, as provided for by the terms of the sale of Creek lands to the United States in article third of this treaty, to be accurately surveyed under the direction of the Commissioner of Indian Affairs, the expenses of which survey shall be paid by the United States."

IV

In 1871, Frederic W. Bardwell, under the direction of the Indian Office, and pursuant to the provisions of article VIII of the treaty of June 14, 1866, *supra*, surveyed the line dividing the Creek country. It later developed that this line, as surveyed and run by Bardwell,

was not a true north and south line as intended by the treaty of 1866, and that a portion of the Creek land not ceded to the United States by this treaty was included with the land west of the Bardwell line.

Following a controversy on this score, Congress by its act of March 3, 1885 (23 Stat. 362, 367), made provision for the withholding of the current appropriations for the Creek Nation, except they should, within 12 months and in pursuance of a resolution of its national council first had and obtained, make and file in the office of the Secretary of State an acceptance and ratification of the Bardwell survey made and approved by the Department under the treaty of June 14, 1866; and it was further provided that the additional lands acquired by the United States through this survey should be held by the United States under the provisions of said treaty of 1866. This mandate was duly accepted by the Creek Nation and subsequently reaffirmed through the agreement of January 19, 1889, between the United States and the Creek Nation, as set forth in the act of Congress approved March 1, 1889 (25 Stat. 757, 759).

13 V

By article I of the agreement of Jan. 19, 1889, ratified by the act of March 1, 1889 (25 Stat. 757, 758), the Creek Nation ceded and granted to the United States "without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established under the said treaty of eighteen hundred and sixty-six", and also granted and released to the United States "all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation."

Section 2 of the act of March 1, 1889, provided that the lands acquired by the United States thereunder—the lands west of the Bardwell line—should be a part of the public domain of the United States.

VI

The west line of the diminished Creek Nation—the Bardwell line—was, by section 1 of the act of Congress approved May 2, 1890 (26 Stat. 81, 82), made a part of the boundary line between Oklahoma Territory and the Indian Territory.

VII

On February 18, 1867, a treaty was concluded between the United States and the Sac and Fox Indians relative to the future home of the latter in the Indian country south of Kansas (15 Stat. 495),

and thereafter an area was selected immediately west of the plaintiff's reduced reservation and was divided from it by the Bardwell line.

Pursuant to the provisions of article VI of the treaty of February 18, 1867, a survey was made of the Sac and Fox Reservation by E. N. Darling in 1872, who ran his divisional lines and closing corners east of the Bardwell line and into the land of the Creek Nation.

VIII

The Darling survey of 1872 was examined and approved on February 15, 1873, by the Commissioner of the General Land Office without discovery of the error.

IX

As a result of the erroneous survey of 1872, and approval thereof by the Commissioner of the General Land Office, a certain strip of land between the closing corners of the Darling survey and the Bardwell line, aggregating 5,575.57 acres, was erroneously included within the area of the Sac and Fox Reservation and was thereafter occupied by that nation to the exclusion of the Creek Nation.

14

X

In 1875, for the purpose of dividing the sections of the Sac and Fox Reservation into 40-acre tracts, H. C. F. Hackbush resurveyed the Sac and Fox territory, and followed the lines run by the Darling section lines and perpetuated the errors of the survey of 1872 by extending the survey lines east of the Bardwell line and into the reservation of the Creek Nation.

Without discovery of the error, the Hackbush survey was examined and approved by the Acting Commissioner of the General Land Office on September 10, 1875.

XI

By article I of the agreement of June 12, 1890, between the United States and the Sac and Fox Nation, as set forth in the act of Congress approved February 13, 1891 (26 Stat. 749, 750), the Sac and Fox Nation ceded to the United States "all their title, claim, or interest" to the land thereinafter described by metes and bounds, "beginning at a point on the left bank of the north fork of the Canadian River, where the west boundary line of the Creek Reservation crosses the same"; the west boundary line of the Creek Nation constituting the line established by the Bardwell survey.

XII

Through the proclamation dated September 18, 1891 (27 Stat. 989) made pursuant to the act of Congress, approved February 13,

1891, the President ordered that, on September 22, 1891, after allotments were made to the Sac and Fox Indians, the residue of the area ceded by the Sac and Fox Nation be opened to white settlement.

XIII

Thereafter allotments were made to individual members of the Sac and Fox Nation and patents were issued to settlers covering the entire area of the Sac and Fox Reservation and covering the area east of the plaintiff's western boundary to the extent of the 5,575.57 acres in question.

XIV

Under the direction of the Department of the Interior, resurveys of the west boundary of the Creek Nation were made in 1895 and 1896 and 1905, through which the original boundary line as surveyed by Bardwell was reestablished as the west boundary of the Creek Nation; and, by the act of Congress approved June 21, 1906 (34 Stat. 325 (364), the boundary line between the Creek Nation, Indian Territory, and the Territory of Oklahoma, as surveyed by Frederic W. Bardwell in 1871 and reestablished by the Geological Survey in 1895 and 1896, was declared to be the west boundary of the Creek Nation.

15 XV

A certain tract consisting of 118.4 acres lying in the extreme southern part of said tract of 5,575.57 acres immediately east of the Bardwell line was patented to settlers under the homestead laws, and was also subsequently allotted to members of the Creek Nation. At the present time these 118.4 acres are in the possession of the settlers having patents therefor. 52.09 acres, also lying in the southern part of same, were sold as unallotted lands of the Creek Nation, but in the adjustment of the acreage included in the overlap, the Creek Nation has received no money for the acreage involved, except as to the tract of 2.88 acres sold to James H. Kean.

XVI

As a result of the erroneous survey by Darling in 1872 and the subsequent disposition of the area in question by allotments or issuance of patents to settlers, the plaintiffs have been deprived since 1872 of the use and enjoyment of a part of their reservation of the aggregate area of 5,575.57 acres, excepting only 118.4 acres allotted or patented to certain members of the Creek Nation.

XVII

From 1846 to 1861, inclusive, the United States paid out of the fund known as the Creek Orphan Fund, established under the

treaty of March 24, 1832, with the Creek Nation (7 Stat. 366), the sum of $69,956.68 for the current expenses of the Indian department within the southern superintendence for the erection of schools, etc.

During the period from 1861 to 1867 there was also expended from the said Creek Orphan Fund the sum of $106,799.68 for the subsistence of certain loyal refugee Indians in Kansas during the Civil War. Of this amount only $6,848.83 was expended for the benefit of refugees of the Creek Nation.

XVIII

Under the act of August 7, 1882 (22 Stat. 301) provision was made for the reimbursement of the Creek Orphan Fund for the said diversions and in connection therewith it was provided as follows:

"That the Secretary of the Interior is hereby authorized and instructed to charge the sum of sixty-nine thousand nine hundred and fifty-six dollars and sixty-eight cents, used for general purposes of the Creek Nation, against the general fund of said nation, and said sum shall be retained by the Secretary of the Interior in such installments as shall not seriously embarass the object of the annual appropriations for the support and necessities of the Creek Nation; but nothing in this act contained shall be construed to prevent the United States from asserting its right to be reimbursed by the Creek Nation in any future settlements therewith the further sum of one hundred and six thousand seven hundred and ninety-nine dollars and sixty-eight cents, expended by the United
16 States out of the Creek Orphans' Fund for the support of loyal Creek refugees."

The Secretary of the Interior has never reimbursed the said sum, or any part thereof, from appropriations made for the Creek Nation.

XIX

The fair average market value, for all purposes, of the land involved, was on July 23, 1926, $30.00 per acre. This value includes the surface, lease, and royalty values.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover from the United States the sum of $163,628.70, and that the defendant is entitled to recover from the plaintiff on its counterclaim the sum of $76,805.51.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of eighty six thousand eight hundred twenty-three dollars and nineteen cents ($86,823.19).

Opinion

WILLIAMS, Judge, delivered the opinion of the court:

This suit is brought under the jurisdictional act of May 24, 1924 (43 Stat. 139), which confers jurisdiction upon the Court of Claims to hear, examine, adjudicate and render judgment "in any and all legal and equitable claims arising under or growing out of any treaty, or agreement between the United States * * *" and the plaintiff Indians, "or arising under or growing out of any act of Congress in relation to Indian affairs * * *" which "have not been heretofore determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States", excepting only "the so-called loyal Creek" claims or any claims with reference to the equalization of allotments heretofore made to the members of the Creek Nation.

By a subsequent enactment (44 Stat. 568) plaintiff was authorized to prosecute its claim in a single suit or bring a separate suit on one or more of such claims. This is one of a series of suits brought under the authority of these acts.

Under the treaty of February 14, 1833 (7 Stat. 417), the United States granted to the Creek Nation, in fee simple, a large tract of land in the then Indian Territory. Subsequently, under the treaty of June 14, 1866 (14 Stat. 785), the Creek Nation ceded back to the United States the entire west half of this tract, to be divided by a line running north and south, which was to be surveyed under the direction of the Commissioner of Indian Affairs.

By the treaty of February 18, 1867 (15 Stat. 495), the United States ceded to the Sac and Fox Indians a tract of land not exceeding 750 square miles in Indian Territory south of Kansas. The lands given were to be selected under the direction of the Secretary of the Interior, and were to be surveyed as to their exterior boundary at the expense of the United States. It developed that the lands
17 selected for the Sac and Fox Reservation lay within that part of the Creek domain ceded to the United States under the treaty of June 14, 1866.

In August 1871 the official survey of the Creek lands was made pursuant to the provisions of the treaty of June 14, 1866, by one Frederic W. Bardwell, who ran and established the line dividing that portion of the Creek domain ceded by the Creek Nation to the United States from that portion of the domain retained by it. It developed later, and is now conceded, that the line as surveyed and run by Bardwell was erroneous, in that it was not a true north and south line as contemplated and required by the treaty, and that land not ceded by the Creek Nation to the United States was included in land lying west of the line. This error, however, has no bearing on the case as the Creek Nation, by the agreement of January 19, 1889 (25 Stat. 757), ratified and confirmed the line as run by Bardwell and ceded to the United States, without reservation or condition, full and complete title to all that part of its former domain lying

west of the line established by Bardwell. The Bardwell line, therefore, although erroneous, became the boundary line between the Creek Nation on the east and the Sac and Fox Nation on the west, and by the act of May 2, 1890 (26 Stat. 81), was designated as the boundary line between the Creek Nation and the new Territory of Oklahoma.

Pursuant to the provisions of the treaty of February 18, 1867, a survey of the Sac and Fox Reservation was made by one E. N. Darling in 1872, who divided the land into sections. Darling erroneously ran his division lines into the Creek domain and his closing corners were placed some distance to the east of the Bardwell line and upon land owned by the Creek Nation. As a result of this survey 5,575.57 acres of Creek lands were erroneously included in the Sac and Fox Reservation. In 1876 one Hackbusch resurveyed Darling's section lines, and in addition thereto subdivided the sections into 40-acre tracts. In this survey he perpetuated the errors of Darling by extending his survey east of the Bardwell boundary line into the Creek Nation. The Darling and Hackbusch surveys were approved by the Commissioner of the General Land Office on February 15, 1873, and September 10, 1875, respectively, apparently without discovery of the errors therein.

By article I of the agreement of June 12, 1890, between the United States and the Sac and Fox Nation, as set forth in the act of Congress of February 13, 1891 (26 Stat. 749), the Sac and Fox Nation ceded all its lands to the United States. It was provided in the agreement that after certain allotments had been made to the Sac and Fox Indians and provisional patents had been issued therefor, the residue of the land ceded should become public lands of the United States, and under such restrictions as may be imposed by law, be subject to white settlement. The 5,575.57 acres of land erroneously included in the Sac and Fox Reservation by the Darling survey were, under the aforesaid agreement and act of Congress, opened to settlement in September 1891, and patents to settlers thereon were subsequently issued by the United States. The original settlers, or persons holding title through them, are now in possession of the land.

Following the opening of the land to settlement and the issuing of patents to settlers thereon, numerous complaints were made to the Indian Office and to the General Land Office as to the conflict-
18 ing claims of homesteaders, Creek Indian allottees and others, in respect to titles to the land, especially those lands lying in that part of the area involved where patents to the same acts were issued to homesteaders, and allotments were made to citizens of the Creek Nation. The United States Geological Survey, in 1895 and 1896, resurveyed the west boundary of the Creek Nation and reestablished the original boundary line as surveyed by Bardwell in 1871. From these surveys the errors made by Darling in his survey of the Sac and Fox Reservation in 1873 clearly appeared, and the fact was established that the 5,575.57 acres of land in question had erroneously been included in that reservation. The Creek Nation, from that time

until now, has continuously and persistently asserted its right and title to the land, and has repeatedly urged before Congress its right to be restored to the possession of the same.

Up to this point in the case the plaintiff and the defendant are in substantial agreement. They agree that the 5,575.57 acres of land involved lie between the Bardwell line on the west and the Darling line on the east; that it was erroneously included as a part of the Sac and Fox Reservation by Darling in his survey, and that the plaintiff is entitled to compensation for the value of the land. The real issue between them is the question of the value of the land. The determination of this question hinges entirely upon the date at which such value is rightly computable. The ascertainment of this date, therefore, is the first question for decision.

The plaintiff contends that it was given fee-simple title to the land under the treaty of February 14, 1833; that it has never been divested of its title to the land; that it is the owner of the land at this time, and that under the jurisdictional act, referring its claim to this court, it is entitled to recover the value of the land as of the date of the filing of the petition herein.

The defendant's contention as stated in the brief is:

"If—and such appears to be the fact—in the area shown by the Darling survey as part of the Sac and Fox domain, land was included which as a matter of fact rightfully belonged to the Creek Nation, it is submitted that by the act of the Commissioner of the General Land Office on February 15, 1873, in approving the erroneous Darling survey, such land was on that date 'taken' by the United States. However wrongful this 'taking' may have been, it conclusively appears that it occurred on February 15, 1873.

"It is further submitted that, through the approval of the Darling survey on February 15, 1873, by the Commissioner of the General Land Office, all land included within the area shown by this survey of necessity thereupon became the property of the Sac and Fox Nation."

The defendant makes the further contention:

"It may here be observed that in the event there should be any doubt as to whether or not the land involved herein was 'taken' by the United States in 1873 through the act of the Commissioner of the General Land Office in approving the Darling survey—there can not be any doubt whatsoever that this land was either acquired from the Sac and Fox Nation, or 'taken' from the Creek Nation, by the United States through the act of Congress approved on February 13, 1891. Indeed, insofar as the land in question herein is concerned, it may be said that there cannot be the slightest doubt that Congress by its act approved on February 13, 1891, intended to accomplish and did accomplish one of two measures in respect of this land: (a) ratified and confirmed the act of the Commissioner of the General Land Office in 1873 in approving the Darling survey, and the United States acquired title to this

19

land from the Sac and Fox Nation; or (b) assuming that the Sac and Fox Nation had no right whatsoever to cede this land to the United States, ratified and confirmed the act of the Commissioner of the General Land Office of 1873 in approving the Darling survey, and thus 'took' the land in question from the Creek Nation."

The defendant cites no authority in support of the contention that the act of the Commissioner of the General Land Office in 1873, in approving the erroneous Darling survey, operated to divest the plaintiff of its title to the land involved, and to vest title thereto in the Sac and Fox Nation, and we know of no authority that does support it. There is nothing in the language of the treaty of 1867 (15 Stat. 495), under which the United States ceded to the Sac and Fox Nation its reservation, indicating an intention on the part of the Government to include in the grant the land involved in suit, or any land other than such as was then owned by the United States. Even if this land had been within the territorial limits of the grant, it would under a well established rule of the law have been impliedly excepted as coming within the terms of the grant, in the absence of specific language leaving no room for doubt as to the intention of the United States to include it as a part of such grant. (Wilcox v. Jackson (13 Pet. 498); Leavenworth, Lawrence & Galveston R. R. Co., v. United States (92 U. S. 733); United States v. Minnesota (270 U. S. 181).) This being true, can it be maintained that the act of the Commissioner of the General Land Office, in approving an erroneous survey, including the 5,575.57 acres as a part of the land granted to the Sac and Fox Nation, operated ipso facto to divest the plaintiff of its title to the land and vest title to the same in the Sac and Fox Nation? In other words, did the administrative act of the Commissioner of the General Land Office in approving an erroneous survey divest the plaintiff of its fee title to the land involved—a thing that Congress itself could only do, and that by the use of specific language leaving no room for doubt as to its intention? We think not.

The act of February 13, 1891, ratified and confirmed an agreement between the United States and the Sac and Fox Indians in which they ceded all their lands to the United States. Article I of the agreement described the land ceded by metes and bounds, the west boundary line of the Creek Reservation being designated as one of the boundaries of the area ceded. It is not contended that the 5,575.57 cares of land involved in this suit come within the limits of the area thus described, as this land lies east of the Creek Nation's western boundary line. It is claimed, however, that such land comes within the cession of Sac and Fox lands by virtue of the following language appearing at the conclusion of the precise description by metes and bounds of the land ceded:

"And all other land or country in Indian Territory, in which said Sac and Fox Nation has or claims any title, claim or interest."

20 It is obvious that the purpose of incorporating this general language in the agreement following the particular designation of the lands ceded was to protect the United States against any and all future claims of the Sac and Fox Indians growing out of the sale and transfer of their lands to the United States. The effect of the language used was to estop the Sac and Fox Nation from asserting at some future date claim of title, or right in any lands in the Indian Territory other than those designated in the agreement. The contention, therefore, that by virtue of this language the United States acquired title to any land not then the property of the Sac and Fox Nation, merely because that Nation claimed some title or interest therein, cannot be sustained. At most the United States acquired only such title in the 5,575.57 acres of land involved as the Sac and Fox Nation itself had in the land. The fee title to the land then being in the plaintiff, the United States under the act of February 13, 1891, acquired no title or interest in the land, other than the unfounded claim of the Sac and Fox Nation to the land, arising out of its occupancy of the same under the erroneous Darling survey.

We hold, therefore, that neither the treaty of 1867 under which the United States granted the Sac and Fox Nation its reservation, nor the action of the Commissioner of the General Land Office in 1873 in approving the erroneous survey of that reservation, nor the act of February 13, 1891, under which the Sac and Fox Nation ceded its lands to the United States, and under the provisions of which the 5,575.57 acres of land were opened to settlement, divested the plaintiff of its title to the land or its right to the possession thereof; that neither the United States nor the Sac and Fox Nation acquired any right, title, or interest in or to the said land by virtue of any of the agreements or acts of Congress aforesaid, or by or through the action of the Commissioner of the General Land Office in approving the erroneous survey in 1873. It follows that the plaintiff was the owner of the land when it was opened to settlement under the proclamation of the President, September 18, 1891. The Government of the United States had no title to it, and therefore its patents to settlers thereon did not operate to convey the land.

The conclusions just stated are supported by affirmative declarations by Congress, in acts approved both before and after the land was opened to settlement in 1891, that the Bardwell line was the west boundary line of the Creek Nation. The first of these acts, the act of March 1, 1889, has already been referred to as definitely fixing the original Bardwell line as the western boundary of the Creek Nation. While the errors made by Darling in his survey of the Sac and Fox Reservation were apparently not known at the time of this enactment, we do not regard that fact as material. The Creek Nation for several years had been pressing a claim against the Government for reimbursement for lands alleged to have been lost to it through the error of Bardwell in establishing the division line in 1871. Congress taking cognizance of this claim, in the act of March 3, 1885, 23 Stat. 362, provided that the Creek Nation should within twelve months,

and in pursuance of a resolution of its national counsel first had and obtained, make and file in the office of the Secretary of State an acceptance and ratification of the Bardwell survey made and approved by the department under the treaty of June 14, 1866.

21 The acceptance of this statutory mandate by the Creek Nation was effectuated by the act of March 1, 1889, supra.

Congress again in the act of June 21, 1906, declared the Bardwell line to be the western boundary line of the Creek Nation, using the following explicit language:

"That the boundary line between the Creek Nation, Indian Territory, and the Territory of Oklahoma, as surveyed by Frederic W. Bardwell in eighteen hundred and seventy-one, and reestablished by the Geological Survey in eighteen ninety-six is hereby declared to be the west boundary line of the Creek Nation."

This act was passed more than 30 years after the approval by the Commissioner of the General Land Office of the survey of the Sac and Fox Reservation, and more than 14 years after the 5,575.57 acres of land in question had been opened to settlement. Congress at the time was fully informed as to all the facts relating to the plaintiff's claim. The record discloses that committees of both the Senate and the House had repeatedly made exhaustive investigations as to every phase of the controversy. Numerous reports dealing with the matter, made from time to time by Commissioners of Indian Affairs, Secretaries of the Interior, and other administrative officials of the Government were considered by Congress. It is significant that no official of the Indian Office, of the General Land Office, or of the Department of the Interior having to do with these matters ever questioned the right or title of the Creek Nation in, or to, these lands, or ever asserted that the United States had title to them at the time they were opened to settlement in 1891. On the contrary, they, without exception, advised Congress that title to the land was in the Creek Nation and that settlers on the land to whom patents had been issued acquired no title to the land thereunder. The Commissioner of Indian Affairs in a report to the Secretary of the Interior, August 7, 1903, said:

"The Government of the United States is not a guarantor of the area within any description of land patented by it under the laws of the United States * * *. At the time the patents were issued, the land was a part of the property of the Creek Nation. The Government of the United States had no title to it, and therefore its patent did not operate to convey the land."

The Secretary of the Interior in a report to Congress on April 9, 1906, said:

"The homestead claimants have no legal title to the land in the Creek Nation east of the Bardwell line patented to them, and * * *"

The Secretary of the Interior in this report recommended to Congress that the 5,575.57 acres be appraised at their cash value and that payment therefor be made to the Creek Nation.

Under these circumstances, and with the undoubted intent and purpose of settling definitely all questions growing out of the various treaties, statutes, and administrative acts of officials of the Indian Office and the General Land Office dealing with the title to the land in controversy, Congress again, as it had done in the acts of March 3, 1885, March 1, 1889, and May 2, 1890, declared the Bardwell line to be the western boundary of the Creek Nation. The act of June 21, 1906, must be regarded as conclusive as to the Creek Nation's right and title to the land in controversy as of that date. The act
22 clearly contemplated the restoration of the land to the Creek Indians through appropriate administrative action. The patents issued to settlers for the land being void, it was within the power of the Government to secure their cancelation, United States v. Minnesota (270 U.S. 181), and to restore the land to the plaintiff. Government officials having charge of the affairs of the Creek Nation took no steps to have the erroneous patents canceled and possession of the land restored to the plaintiff after the passage of the act of June 21, 1906, and the matter was allowed to drift until May 24, 1924, when jurisdiction was conferred on this court to "hear, examine, and adjudicate and render judgment" on the plaintiff's claim.

The plaintiff being the owner of the land, is legally and equitably entitled to be placed in possession of it. The court, however, is without authority to put the plaintiff in possession of the land, and has jurisdiction only to render a money judgment for its value. This being true, we think the plaintiff is entitled to judgment for the value of the land as of the date of the institution of this suit, July 3, 1926. Its fee simple title to the land held for more than ninety years has never been extinguished. It was the owner of the land on the date of the institution of its suit, and is the owner of the land now. That it has long been denied the right to possess and occupy the same does not in any way affect its title to the land or its right to be restored to the possession of the same. Plaintiff is now suing to recover the value of the lands which it owned in fee on the date of the filing of its suit. Certainly a judgment of the court based on the 1873 or the 1891 value would not give the plaintiff either legal or equitable compensation for the land. We hold therefore, that the plaintiff is entitled to recover the value of the land as of the date of the bringing of its suit. It has been within the power of the Government, at all times since the erroneous inclusion of the plaintiff's land in the Sac and Fox Reservation, and since it was erroneously opened to settlement and patented to homesteaders in 1891, to have the value of the lands appraised and to pay for the same by direct appropriation by Congress, or to, by an appropriate jurisdictional act, authorize the plaintiff to bring suit on its claim and have the value of the lands in controversy judicially determined. Had the Government pursued either of these courses the plaintiff would have been entitled to receive and would have received the value of its lands as of the date of its compensation for them. However, nothing was done to right the great wrong

perpetrated upon the plaintiff, by the repeated errors of the Government, until it was given the right to bring suit in this court under the act of May 24, 1924. We think, therefore, the plaintiff is entitled as a matter of law, as well as in equity and good conscience, to receive the value of its lands as of the date of the bringing of its suit.

The value of the land involved is entirely a question of fact to be determined by the evidence. We have found the value of the land for all purposes, including its surface, lease, and royalty values, is $30 per acre.

A tract consisting of 170.49 acres was located in the extreme southern part of the 5,575.57-acre tract. Of this 170.49-acre tract 118.4 acres were patented to settlers and were also subsequently allotted to members of the Creek Tribe. Deeds for the entire 118.4 acres
23 were made by chiefs of the Creek Nation to individual Indian allottees, and were duly approved by the Secretary of the Interior. The Creek Nation having divested itself of title to this 118.4 acres of land can not maintain suit for recovery of the value of the same under the jurisdictional act of May 24, 1924.

The remaining 52.09 acres of the 170.49-acre tract were sold as unallotted land of the Creek Nation. The Creek Nation, however, has received no money for any part of the 52.09 acres so sold, except 2.88 acres sold to James H. Kean. The defendant is entitled to credit for this 2.88-acre tract, making a total of 121.28 acres out of the 5,575.57 acres erroneously included in the Darling survey for which plaintiff cannot recover.

Plaintiff, therefore, is entitled to recover the sum of $163,628.70, the value of 5,454.29 acres, less the amount the defendant is entitled to recover on its counterclaim, which will next be considered.

DEFENDANT'S COUNTERCLAIM

Pursuant to article 2 of the treaty of March 24, 1832 (7 Stat., 366), 20 sections of land within Benton and Chambers Counties, Alabama, were reserved for the "orphan children of the Creeks." The act of March 3, 1837 (5 Stat. 186), authorized the President to sell the land, and if he thought proper, to invest the whole or any part of the purchase money in stocks, and to pay the interest to the persons entitled thereto. Pursuant to the act, the land in question was sold and the proceeds realized therefrom invested in interest-bearing State bonds. The principal of the fund thus created was carried on the books of the United States Treasury under the heading "Creek Orphan Fund" and the interest thereon was carried under the heading "Interest on Creek Orphan Fund."

It was claimed by the Creek Nation at various times subsequent to the establishment of the aforesaid Creek Orphan Fund that certain disbursements from the interest thereon were made for purposes not contemplated by the treaty of 1832. Finally it was determined by Congress in 1882 that there had been expended without authority

of law, and without the consent of the Creek orphans, $69,956.68 for general purposes of the Creek Nation, and $106,799.68 for support of loyal refugees of the Creek Nation during and following the Civil War.

By the act of August 7, 1882 (22 Stat. 301), the aforesaid sum amounting to $176,755.97, with interest thereon from April 6, 1872, was appropriated for the purpose of reimbursing the Creek Orphan Fund for the sums thus improperly disbursed. By the said act it was provided:

"That the Secretary of the Interior is hereby authorized and instructed to charge the sum of sixty-nine thousand nine hundred and fifty-six dollars and sixty-eight cents, used for general purposes of the Creek Nation, against the general fund of said nation, and said sum shall be retained by the Secretary of the Interior in such installments as shall not seriously embarrass the object of the annual appropriations for the support and necessities of the Creek Nation; but nothing in this act contained shall be construed to prevent the United States from asserting its right to be reimbursed by the Creek Nation in any future settlements therewith the further sum of one
24 hundred and six thousand seven hundred and ninety-nine dollars and sixty-eight cents, expended by the United States out of the Creek Orphans Fund for the support of loyal Creek refugees."

The defendant has presented a counterclaim for the aforesaid expenditures, and asks that they be set off against the amount of judgment awarded to the plaintiff on its claim. The defendant is clearly entitled to recover on its counterclaim as to the $69,956.68 item. These funds were disbursed for general purposes of the Creek Nation and are proper charges to be made against it by the Government.

The report of the General Accounting Office in the case of The Creek Nation v. United States, H–510, shows that only $6,848.83 of the $106,603.29 disbursed from "interest on the Creek Orphan Fund" for the relief of refugee Indians during the years 1863 to 1867, was in fact expended for the benefit of the citizens of the Creek Nation, and that the balance thereof was expended for the benefit of members of other tribes of Indians. The sum expended by the United States for the care of refugee Creek Indians was an expenditure properly chargeable to the Creek Nation, and the defendant is entitled to recover $6,848.83 on this item of its counterclaim.

Our conclusion therefore is, that the plaintiff is entitled to recover $163,628.70 on its petition. The defendant is entitled to recover the sum of $76,805.51 on the two items of its counterclaim.

The plaintiff is entitled to a judgment in the sum of $86,823.19, and judgment in that amount is hereby ordered to be entered.

WHALEY, Judge; LITTLETON, Judge; and GREEN, Judge; concur.

BOOTH, Chief Justice, took no part in the decision of this case on account of illness.

25 VI. *Judgment*

At a Court of Claims held in the city of Washington on the 13th day of March, A.D. 1933, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover from the United States the sum of $163,628.70, and that the defendant is entitled to recover from the plaintiff on its counterclaim the sum of $76,805.51.

It is adjudged and ordered that the plaintiff recover of and from the United States the sum of eighty-six thousand eight hundred twenty-three dollars and nineteen cents ($86,823.19).

VII. *Proceedings after entry of judgment*

On May 10, 1933, the defendant filed a motion for new trial.

On December 4, 1933, the court entered the following order on said motion:

Order

It is ordered this 4th day of December, A.D. 1933, that the defendant's motion for new trial be and the same is hereby overruled.

26 [Clerk's certificate to foregoing transcript, omitted in printing.]

(Endorsement on cover:) File No. 38,437. Court of Claims. Term No. 834. The United States, petitioner, vs. The Creek Nation. Petition for a writ of certiorari and exhibit thereto. Filed March 2, 1934. File No. 834 O.T. 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1934

23 Supreme Court of the United States

Order allowing certiorari

Filed April 9, 1934

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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